VERMONT SUPERIOR COURT
Environmental Division
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ENVIRONMENTAL DIVISION
Docket No. 21-ENV-00057

In re Eagle Mountain Shores, Inc., CU

ENTRY REGARDING MOTION

Title: Motion for Partial Summary Judgment (Motion # 2)
Filer: Lisa B. Shelkrot, Attorney for Appellant Edward Norris
Filed Date: June 10, 2022

The Motion is GRANTED.

Appellant Edward Norris (Appellant) appeals from a decision of the Town of Milton Development Review Board (DRB). In that decision, the DRB approved the conditional use and variance applications of Applicant Eagle Mountain Shores, Inc. (Applicant) to install a terraced stone wall on a lakeshore parcel owned by Applicant. Presently before the court is Appellant's unopposed motion for partial summary judgment on Questions 5 and 6 of its Statement of Questions, which concern whether Applicant is entitled to a variance.

Factual Background

We recite the following factual and procedural background, which we understand to be undisputed unless otherwise noted, based upon the record before us and solely for the purposes of deciding the pending motions. These recitations do not constitute factual findings, since factual findings cannot occur until after the Court has completed a trial. Fritzeen v. Trudell Consulting Eng'rs, Inc., 170 Vt. 632, 633 (2000) (mem.); *see also* Blake v. Nationwide Ins. Co., 2006 VT 48, ¶ 21, 180 Vt. 14.

1. Applicant owns a parcel of land on the shore of Lake Champlain in Milton.
2. The parcel of land does not have an E-911 address or Tax ID, or at least none have been reported.
3. The subject parcel is in the Shoreland Residential (R6) Zoning District. Some or all of the subject parcel is also located in the Flood Hazard Overlay (FHO) District.
4. Applicant's shareholders are Tracey Ann Tobin, Christopher and Mary Jeanne Mitiguy, and Lawrence and Yvette Hochberg.
5. These shareholders live on properties across Eagle Mountain Harbor Road from the subject parcel.
6. The shareholders have historically used the subject parcel to access the lake.
7. In 2003, Applicant's predecessor in interest applied for and obtained after-the-fact variances for a wooden deck and retractable staircase. The staircase runs down a steep cliff from Eagle Mountain Harbor Road to the lake shore.
8. These variances approved the building of the deck and staircase within 3 feet of the road instead of the usual 35-foot front yard setback and 0 feet from Lake Champlain instead of the usual 200-foot shoreline setback. The variances were not appealed.

9. Over the years since the stairs and deck were constructed, a portion of the stairs and deck have been destroyed by high water events.
10. There is some erosion on the bank down which the stairs currently run.
11. In March of 2021, Applicant submitted the present applications, through which it proposes to remove the remainder of the existing wooden deck and staircase and replace it with a terraced stone retaining wall.
12. A portion of this wall is proposed be used as a "party patio."
13. The wall would enable reconstruction of a staircase, although no staircase is proposed as part of the present applications.
14. The primary purpose of the stone terraced wall is to provide access to the lakeshore.
15. An additional benefit of the wall is that it would help prevent erosion on the cliff between the Lake and Eagle Mountain Harbor Road. Applicant does not maintain that the proposed wall is necessary to prevent erosion.
16. Appellant owns and maintains a residence on the parcel immediately to the south of the subject parcel.
17. In these applications, Applicant proposes to build the retaining wall within 21 feet of the southern property line shared with Appellant.
18. The side-yard setback established in the R6 District is 35 feet.
19. Applicant investigated the possibility of replacing the existing damaged wood staircase with a metal staircase. Applicant ultimately did not pursue that possibility due to concerns over expense, aesthetics, and the fact that such a staircase would not help to prevent erosion.

Legal Standard

In a de novo appeal such as this, we "do[] not consider any previous decisions or proceedings below; rather, we review the application anew as to the specific issues raised in the statement of questions." In re Killington Village Master Plan Act 250, No. 147-10-13 Vtec, slip op. at 5–6 (Vt. Super. Ct. Envtl. Div. Aug. 6, 2014) (Durkin, J.); *see also* Chioffi v. Winooski Zoning Bd., 151 Vt. 9, 11 (1989) ("A de novo trial 'is one where the case is heard as though no action whatever had been held prior thereto." (quoting In re Poole, 136 Vt. 242, 245 (1978)). The applicant retains the "ultimate burden to demonstrate compliance with the applicable regulations" in a de novo appeal. Burton Corp. Site Work Approval, No. 15-2-20 Vtec, slip op. at 14 (Vt. Super. Ct. Envtl. Div. June 25, 2021) (Durkin, J.).

To prevail on a motion for summary judgment, the moving party must demonstrate "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." V.R.C.P. 56(a), applicable here through V.R.E.C.P. 5. The nonmoving party "receives the benefit of all reasonable doubts and inferences," but must respond with more than unsupported allegations in order to show that material facts are in dispute. Robertson v. Mylan Labs., Inc., 2004 VT 15, ¶ 15, 176 Vt. 356. When, as here, the nonmoving party bears the ultimate burden of persuasion at trial on an issue, the moving party "may satisfy its burden of production by showing the court that there is an absence of evidence in the record to support the nonmoving party's case. . . . The burden then shifts to the nonmoving party to persuade the court that there is a triable issue of fact." Boulton v. CLD Consulting Engineers, Inc., 2003 VT 72, ¶ 5, 175 Vt. 413 (citation omitted).

It is the nonmoving party's responsibility at summary judgment to contest through a numbered document those of the moving party's statement of undisputed material facts which it believes are genuinely disputed; if it does not do so, the Court may consider those facts accepted for the purposes of deciding the motion. V.R.C.P. 56(c)(2), (e)(2).

Discussion

As an initial matter, Appellant's motion does not indicate on which Questions he seeks summary judgment. Questions 5 and 6 of the Statement of Questions address Applicant's entitlement to a variance of the side-yard setback, the sole subject of the motion. We therefore will consider the motion a request for judgment on those two Questions, although as we indicate below, granting judgment on these Questions concludes this appeal.

The Town of Milton Unified Development Regulations (UDR) specify six criteria that applications for a "general variance" must meet. These are:

i. The proposed land development will not alter the essential character of the area or district in which the property is located.
ii. The proposed land development will not substantially or permanently impair the lawful use or development of adjacent property.
iii. The proposed land development will not be detrimental to public health, safety or welfare.
iv. The applicant has not created the unnecessary hardship.
v. The applicant is proposing the least deviation possible from these regulations that will afford relief.
vi. There are unique physical circumstances or conditions, including irregularity, narrowness, or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property. These conditions, and not the circumstances or conditions generally created by the provisions of these regulations in the district in which the property is located, have created an unnecessary hardship for the applicant. These physical circumstances or conditions prevent the property from possibly being developed in strict conformity with these regulations and a variance is necessary to enable reasonable use of the property.

UDR § 4605.D and Figure 4-01. For applications proposing development in the Flood Hazard Overlay District, the following criterion also applies:

vii. The proposed land development meets all applicable federal and state rules for compliance with the National Flood Insurance Program

Id. These criteria substantively mirror those that the statute which enables municipalities to adopt zoning laws mandates they consider for proposed variances. *See* 24 V.S.A. § 4469(a), (d). Appellant has specifically challenged whether the application demonstrates compliance with criteria "v" and "vi," as listed above; that is, whether the application represents the minimum variance that will afford relief and whether the property cannot be developed in strict conformity with the bylaws, making the variance necessary for any reasonable use.

i. Is this the minimum variance that will afford relief?

Again, Applicant bears the ultimate burden of proof as to whether the proposal represents the "least deviation possible . . . that will afford relief," and all Appellant must do to meet his initial burden of production in this summary judgment phase is demonstrate the absence of evidence in the record supporting Applicant's case. Appellant has done so here, providing evidence that the primary purpose of this project is to provide access for Applicant's members to the lakeshore and that the proposed wall is not necessary to prevent erosion; rather, that is a secondary benefit the wall provides. Given Applicant's failure to respond to Appellant's statement of undisputed material facts, we treat these facts as undisputed for the purposes of this motion. V.R.C.P. 56(e)(2).

Whether the application requests the minimum variance that will afford relief must be measured against this stated purpose for the project. Nothing in the application materials demonstrates either that a wall is necessary to provide access to the lakeshore or that if a wall is built it must be built to within 21 feet of the shared property line with Appellant. This project design therefore does not represent the minimum variance that will afford relief. Given that each and every variance criterion must be met for us to approve a variance, *see* In re Fecteau, 149 Vt. 319, 321 (1988), we **GRANT** Appellant judgment on Questions 5 and 6 and conclude that the project does not meet the Town's and State's criteria for a variance of either the general or the flood hazard setback criteria.

ii. Is the requested variance necessary to enable reasonable use of the property?

For similar reasons, Appellant has also demonstrated the absence of evidence in the record to sustain Applicant's burden of proof that the variance is necessary to enable reasonable use of the property. There is no evidence that the property cannot be developed in strict conformity with the Bylaws—or at least that it cannot be developed without any greater degree of nonconformity than was already approved of through the 2003 variances. Those variances represent the baseline situation at the time of this application, and the staircase and deck they approved of have provided Applicant's members with access to the shoreline since 2003. Although the existing stairs and deck are damaged, Applicant has not provided any evidence why they cannot be reconstructed or replaced with a more durable staircase. Either option would not require infringing on the side-yard setback and represents a reasonable continued use of the property. As such, Applicant has not provided any evidence that the proposed wall is necessary for reasonable use of the property. This failure represents a further reason why we grant the present motion as to Questions 5 and 6.

Conclusion

As expressed above, we hereby **GRANT** Appellant's unopposed motion for summary judgment on Questions 5 and 6 of the Statement of Questions. We conclude that the project does not meet the Town's and State's criteria for a variance of either the general or the flood hazard setback criteria, specifically with respect to the side-yard setback from the southern property line. Because we deny the request for a variance, conditional use review is moot. We hereby **REVERSE** the May 19, 2021 DRB decision[1] granting these applications. Any permits issued pursuant to that decision must now be **VACATED**. A Judgment Order is issued concurrently with this opinion.

Electronically Signed: 8/29/2022 8:14 AM pursuant to V.R.E.F. 9(d).

Thomas G. Walsh, Judge
Vermont Superior Court, Environmental Division

[1] The decision is dated May 19, 2020 at the signature line, however this is clearly an error: The decision indicates that the vote on the applications was taken May 13, 2021 and all hearings on the applications were in 2021.

Separately, we note that in our decision on the record on "motion to confirm scope of review" in this matter, we affirmed that Applicant may submit a new application for this proposed seawall as an accessory structure.